

1 **LAW OFFICES OF JOHNNY L. GRIFFIN III**

2 **JOHNNY L. GRIFFIN, III** (SBN 118694)

3 **MANOLO OLASO** (SBN 195629)

4 1010 F Street, Suite 200

5 Sacramento, California 95814

6 Telephone: (916) 444-5557

7 Fax: (916) 444-5558

8 Email: jgriffin@johnnygriffinlaw.com;

9 molaso@johnnygriffinlaw.com

10 Attorneys for Plaintiff WARIS GILDERSLEEVE

11 **UNITED STATES DISTRICT COURT**

12 **EASTERN DISTRICT OF CALIFORNIA**

13 **SACRAMENTO DIVISION**

14 WARIS GILDERSLEEVE, an individual,

15 Plaintiff,

16 vs.

17 CITY OF SACRAMENTO, et al.,

18 Defendants.

Case No.: 2:22-cv-02145-JAM-AC

**Opposition to Motion for Summary
Judgment or alternatively Partial Summary
Judgment; Memorandum of Points and
Authorities**

Hearing Date: June 17, 2025

Time: 1:00 p.m.

Court: 6

Before the Honorable District Judge John A.
Mendez

19 **OPPOSITION**

20 Plaintiff Waris Gildersleeve hereby opposes defendants' motion for summary judgment
21 (MSJ; ECF Docs. 24 through 24-4) and submits this memorandum of points and authorities in
22 support of his opposition. The MSJ should be denied because genuine issues of material fact exist as
23 to plaintiff's disparate treatment discrimination theory, and as to the individual defendants'
24 contribution to a hostile work environment. Plaintiff's opposition consists of this memorandum of
25

1 points and authorities, his responses to defendant’s statement of undisputed acts, his declaration, on
2 the pleadings filed, and on any oral argument that may be made at the hearing of the motion.

3 Dated: April 28, 2025

/s/ Manolo Olaso

4 Manolo Olaso

5 Law Offices of Johnny L. Griffin, III

Attorneys for Plaintiff Waris Gildersleeve

6 MEMORANDUM OF POINTS AND AUTHORITIES

7 I. Law and Argument

8 A. Summary judgment standards

9 For summary judgment, defendants must show that there is “no genuine issue of material
10 fact and [that] the moving party is entitled to summary judgment as a matter of law.” *FRCP*
11 *56(c)(2)*. A material fact is one that could affect the outcome of the suit, and a genuine issue is one
12 that could permit a reasonable jury to enter a verdict in the non-moving party’s favor. *Anderson v.*
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the
14 initial burden of establishing the absence of a genuine issue of material fact and can satisfy this
15 burden by presenting evidence that negates an essential element of the non-moving party’s case.
16 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Alternatively, the moving party can
17 demonstrate that the non-moving party cannot produce evidence to support an essential element
18 upon which it will bear the burden of proof at trial. *Id.*

19 Once the moving party meets its initial burden, the burden shifts to the non-moving party to
20 “designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting then-
21 Fed. R. Civ. P. 56(e)). A factual dispute is genuine where “the evidence is such that a reasonable
22 jury could return a verdict for the non-moving party.” *Anderson v. Liberty Lobby, Inc.*, 477 US 242,
23 252 (1986). Once the burden shifts back to the non-moving party, it must “do more than simply
24 show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v.* 2
25

1 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing evidence presented by the non-movant
2 must be sufficiently probative to permit a reasonable trier of fact to find in his favor. *Anderson*,
3 *supra*, at 252. “The non-movant need not match the movant witness for witness, nor persuade the
4 court that her case is convincing, she need only come forward with appropriate evidence
5 demonstrating that there is a pending dispute of material fact.” *Waldridge v. American Hoechst*
6 *Corp.*, 24 F. 3d 918, 921 (7th Cir. 1994). Because summary judgment is a “drastic device,” cutting
7 off the plaintiff’s right to present her case to the jury, defendants bear a “heavy burden” of
8 demonstrating the absence of any material issues of fact. *Nationwide Life Ins. Co. v. Bankers*
9 *Leasing Ass’n, Inc.*, 182 F. 3d 157, 160 (2nd Cir. 1999).

11 Additionally, “[t]he judge’s function is not himself to weight [sic] the evidence and
12 determine the truth of the matter but to determine whether there is a genuine issue for
13 trial...Credibility determinations, the weighing of the evidence, and the drawing of legitimate
14 inferences from the facts are jury functions....” *Anderson, supra*, 477 US at 252.

15 “At the summary judgment stage, the non-movant’s version of any disputed issue of fact is
16 presumed correct.” *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 US 451, 456 (1992).
17 That is, the court must view the evidence presented on the motion in the light most favorable to the
18 opposing party: “The evidence of the non-movant is to be believed, and all justifiable inferences are
19 to be drawn in his favor.” *Anderson, supra*, 477 US at 252.

21 **B. Gildersleeve suffered disparate treatment discrimination because he received**
22 **undeserved performance reviews which contributed to, caused, and/or were**
23 **accompanied by abusive conduct because of his race which permanently altered**
24 **his working environment at Station 6.**

25 The defense argues that Gildersleeve’s disparate treatment claims under Title VII and FEHA
fail because he cannot show he suffered an adverse employment action. However, the record shows
that Gildersleeve suffered an adverse employment action: he received undeserved negative

1 performance reviews because of his race, and the reviews caused, contributed to, and/or were
2 closely accompanied by severe/pervasive conduct because of Gildersleeve's race which
3 permanently altered his work environment.

4 To prove disparate treatment, the plaintiff must prove the following prima facie case: (1) the
5 plaintiff suffered an adverse employment action by the defendant, (2) the defendant took the adverse
6 action against the plaintiff because of plaintiff's race (3) the plaintiff was qualified for the position,
7 and (4) similarly situated individuals outside the plaintiff's race were treated more favorably. *Berry*
8 *v. Dep't of Soc. Servs.*, 447 F.3d 642, 656 (9th Cir. 2006).

9 Here, the defense takes aim only at the first element: absence of adverse employment
10 action.¹ The defense characterizes the circumstances surrounding Gildersleeve's probationary period
11 as attempted adverse actions that ultimately were not fulfilled, and that Gildersleeve suffered no
12 material changes in his employment.

13 An employer's action qualifies as an actionable adverse employment action only if it
14 "materially affects the compensation, terms, conditions, or privileges of employment." *Spokoiny v.*
15 *Univ. of Wash. Med. Ctr.*, 2025 U.S. App. LEXIS 5698, *2-3 (9th Cir. 2025) (citing *Campbell v.*
16 *Hawaii Dep't of Educ.*, 892 F.3d 1005, 1012 (9th Cir. 2018); quoting *Davis v. Team Elec. Co.*, 520
17 F.3d 1080, 1089 (9th Cir. 2008)). Although a low performance review, standing alone, does not
18 constitute an adverse employment action, the Ninth Circuit recognizes that if the review is
19
20

21
22 ¹ The defense references the *McDonnell-Douglas* burden-shifting test. Although the test is useful at
23 the summary judgment stage, its use is not required. See *McGinest v. GTE Serv. Corp.*, 360 F.3d
24 1103, 1122 (2004) (citation omitted). When responding to a summary judgment motion, the plaintiff
25 is presented with a choice regarding how to establish his or her case. *Ibid.* A plaintiff may proceed
by using the *McDonnell-Douglas* test, or alternatively, may simply produce direct
or circumstantial evidence demonstrating that a discriminatory reason more likely than not
motivated the employer. *Ibid.*

1 accompanied by some change in the conditions/privileges of employment, those circumstances may
2 be sufficient to qualify as an adverse employment action. *Ibid.*

3 The record shows that Brust and Lauchner wrote and/or contributed to the reporting of
4 negative performance reviews for Gildersleeve, the reviews were undeserved (Gildersleeve Decl.
5 paras. 22, 23, 30, 31), the reviews were negative because of Gildersleeve's race rather than
6 performance, and the reviews caused, contributed to, and/or were accompanied by severe/pervasive
7 racially abusive conduct that permanently altered Gildersleeve's work environment (*Gildersleeve*
8 *Decl.* paras. 22, 23, 30, 31, 44).²

9 The record shows that Brust and Lauchner were cold and contemptuous towards
10 Gildersleeve (*Gildersleeve Decl.* paras. 20, 23, 31, 34) as they were to the only other Black
11 personnel at Station 6 (*Gildersleeve Decl.* paras. 18-19). The record shows Brust and Lauchner and
12 other white firefighters were warm and friendly to one another and did not curse at a white probie
13 who was there (*Gildersleeve Decl.* paras. 18, 21). In addition, Brust, Gildersleeve's supervisor,
14 personally observed Gildersleeve being verbally abused at Station 6, but did nothing to intervene
15 (*Gildersleeve Decl.* paras. 13, 14, 23, 25, 31). Finally, a jury could infer that it was Brust who
16 contacted other captains at Station 2 to disseminate undeserved negative information about
17 Gildersleeve (*Gildersleeve Decl.* para. 35). *See Hashimoto v. Dalton*, 118 F.3d 671, 674 (9th Cir.
18 1997) (dissemination of a negative employment reference can constitute an adverse employment
19 action if motivated by discriminatory intent). Based on these circumstances, the undeserved low
20 performance reviews and negative reference combined with the hostile working environment
21 permanently changed the conditions and privileges of Gildersleeve's employment. He suffered an
22 adverse employment action.

23
24
25 ² The severe and/or pervasive nature of the racially abusive conduct is outlined in more detail in the
section below regarding FEHA harassment by supervisors.

1 **C. Individual liability for disparate treatment discrimination under FEHA.**

2 Under FEHA, only employers are liable for disparate treatment discrimination; individual
3 employees, including supervisors, are not. *See Reno v. Baird*, 18 Cal.4th 640, 647 (1998)
4 (superseded on other grounds by 2001 statute). For this reason, Gildersleeve does not oppose
5 defendants’ motion as to this FEHA disparate treatment individual liability theory.³

6 **D. Brust and Lauchner are individually liable under FEHA for racial harassment as**
7 **Gildersleeve’s supervisors.**

8 The defense argues that because Brust and Lauchner did not substantially assist or encourage
9 harassment, they cannot be held individually liable under FEHA. Here, as discussed above, the
10 record shows that Brust and Lauchner were cold and contemptuous towards Gildersleeve
11 (*Gildersleeve Decl.* paras. 20, 23, 31, 34) as they were to the only other Black personnel at Station 6
12 (*Gildersleeve Decl.* paras. 18-19). The record shows Brust and Lauchner and other white firefighters
13 were warm and friendly to one another and did not curse at a white probie who was there
14 (*Gildersleeve Decl.* paras. 18, 21). In addition, Brust, Gildersleeve’s supervisor, personally observed
15 Gildersleeve being verbally abused at Station 6, but did nothing to intervene (*Gildersleeve Decl.*
16 paras. 13, 14, 23, 25, 31). In fact, Brust witnessed Lauchner, one of Gildersleeve’s supervisors,
17 personally participate in cursing at Gildersleeve, and Brust did not intervene (*Gildersleeve Decl.*
18 para. 23). Brust’s and Lauchner’s conduct and the conduct of subordinate firefighters violate the
19 Rules and Regulations governing firefighter behavior (*Gildersleeve Decl.* paras. 5-6). A jury could
20 infer from these violations that Brust and Lauchner participated in violations and/or encouraged and
21 assisted in violations.

22
23 ³ However, defendants Brust and Lauchner, as individual supervisors, may be held liable for racial
24 harassment. *See Cal. Gov’t Code Sec. 12940 (j)(3); Page v. Superior Court*, 31 Cal.App.4th 1206,
25 1212 (Cal. 3rd Dist.; 1995) (FEHA “unambiguous” in imposing personal supervisory liability for
harassment); *Roby v. McKesson Corp.*, 47 Cal.4th 686, 709 (2009) (individual supervisors can be
held liable for “biased personnel management actions so long as that evidence is relevant to prove
the communication of a hostile message”).

1 Brust and Lauchner, as supervisors, laughed at and criticized Gildersleeve, along with other
2 white firefighters, during presentations (Gildersleeve Decl. para. 26) and when Gardner cursed at
3 Gildersleeve during dinner (Gildersleeve Decl. para. 25). A jury could infer from these
4 circumstances that when white subordinates see their white supervisors laughing at and ridiculing
5 Gildersleeve, the subordinates felt encouraged to laugh at and ridicule Gildersleeve too. Finally, a
6 jury could infer from this record that Brust relied on reports from Lauchner and from subordinates
7 to write negative comments in Gildersleeve's probation packet, meaning Brust encouraged
8 Lauchner and subordinates to continue berating Gildersleeve by using their reports to fill out
9 Gildersleeve's official probation packet. Also, a jury could infer that it was Brust who personally
10 contacted other captains at Station 2 to disseminate undeserved negative information about
11 Gildersleeve (Gildersleeve Decl. para. 35).

12 Based on these circumstances, a jury could find that Brust and Lauchner personally
13 participated in the creation of a racially hostile work environment, and also substantially
14 assisted/encouraged others to create and maintain a racially hostile work environment.

15 **E. FEHA failure to prevent discrimination**

16 Gildersleeve alleges in his First Amended Complaint (FAC) that the City of Sacramento
17 failed to prevent racial discrimination and harassment. FAC paras. 35-37. The defense argues there
18 is no evidence to support a claim for racial discrimination , thus there can be no claim for failure to
19 prevent racial discrimination. Because a jury could find racial discrimination and harassment
20 occurred, as discussed above, the defendants' motion should be denied.

21 **CONCLUSION**

22 Because the record shows disparate treatment racial discrimination by the City of
23 Sacramento, and because the Brust and Lauchner personally participated in, and/or substantially
24 assisted/encourage the creation of a racially hostile work environment, the defense motion should be
25 denied.

1 Dated: April 28, 2025

/s/ Manolo Olaso

2 Manolo Olaso

3 Law Offices of Johnny L. Griffin, III

4 Attorneys for Plaintiff Waris Gildersleeve

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25